STANDARDS OF CONDUCT FOR PROSECUTION AND DEFENSE PERSONNEL: AN ATTORNEY'S VIEWPOINT

By
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It seems to me that lawyers have two methods of treating the subject of ethical standards for the prosecution and defense of criminal cases. On one hand we refer to the platitudes or, as Professor Starrs describes them, the "glittering generalities" contained in the canons. We stress that a trial is a search for truth, and that the lawyer is not only an advocate but also an officer of the court. We note that defense counsel owes "entire devotion" to the interests of his client and that he must preserve the confidences of his client, yet he must not be a party to fraud or chicane. On the other hand, lawyers are called upon to discuss and to resolve specific problems that arise in the trial of criminal cases, and these problems are frequently difficult of resolution. I submit that the Canons of Ethics are so vague, so ambiguous, and so contradictory that they are of little or no help in resolving these problems, and that almost any position, on a given issue, can reasonably be defended with support from the canons. Perhaps a good example is the question whether it is proper for the lawyer to advise his client concerning the law before he elicits the facts. Although I hold that this practice is improper, I believe that it can be defended. I would point out that Professor Freedman has defended this position logically and authoritatively in his recent article, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions," published in the *Michigan Law Review.*

I therefore suggest that ethical problems are more frequently than not resolved by the individual's notions of propriety and fair play. Mr. Bress has referred us to Canon 5, which states that, "The lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law." That is an admirable standard, but who is to say what is "fair and honorable"? In the Legal Aid Agency for the District of Columbia the staff attorneys often seek assistance with respect to problems presented in their cases. In these situations we may have reference to the canons, but almost invariably they are of no help. The result is a discussion which, hopefully, leads to a consensus of what is "fair and honorable." That, I submit, is the best that can be done

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until the standards are clarified; however, this is a very disturbing state of affairs for those concerned about the proper administration of criminal justice and the effective defense of those accused of crime. Some other individual's notions of fair play, because they differ from mine, may enable him to render more effective assistance to his clients. This unfortunate state of affairs is bound to continue until more specific guidelines are established.

With these general observations in mind, I turn to our hypothetical case. This is a rape case and the complaining witness refuses to speak with defense counsel prior to trial, saying that the prosecutor "said to call the police if anyone tampered with me." Now, whatever the prosecutor actually said to her, it seems clear that she was given to understand that defense efforts to interview her would constitute improper "tampering." This, of course, is not only improper but would constitute a due process violation under the recent case of *Gregory v. United States*,[1] which held that the prosecution may not advise witnesses that they should speak with defense representatives only in the prosecutor's presence.

The second point concerns the prosecutor's failure to reveal a witness to defense counsel. In the federal system he is permitted to do this, but *only* if the witnesses have no information which might be considered favorable to the defense.[2] In the hypothetical it seeems there is an old man whose recollection of what the defendant said as he got out of the complainant's auto tends to contradict the complainant's testimony. I submit that the prosecutor has a duty to advise defense counsel of a witness whose testimony will tend to impeach that of a key prosecution witness, and that this duty exists prior to trial. In that connection, I would hold that the F.B.I. record of convictions of a government witness is the sort of helpful information which should be made available to the defense under *Brady*. This record is easily accessible to the prosecution in this jurisdiction, but at present is not being made available to the defense except in situations where the court compels disclosure.

Question one inquires "how would you conduct the defense" under the facts given. I have no difficulty at all with this one. The accused has consistently maintained his innocence to me, and I should tender him as a witness and conduct his defense with vigor notwithstanding my doubts about his truthfulness. I would also tender the witness Jones whose testimony regarding the lack of chastity of the complaining witness is relevant to the question of consent. The fact that the young lady's reputation suffers is one of the unfortunate consequences of the law

1. Case No. 19,599. U.S. Court of Appeals (D.C. Cir., 28 July 1966) (not reported).
2. Brady v. Maryland, 373 U.S. 83 (1963).

which makes this type of evidence relevant when consent is interposed as a defense.

Question two is difficult. The defendant has admitted guilt, and counsel knows that there was no consent on the part of the complainant. In this situation I would point out that the defendant has every right to go to trial, at which trial I would vigorously cross-examine the government witnesses even though I may know they are telling the truth. This is proper because the government always bears the burden of proof, and attacking and discrediting government witnesses is simply one means of putting the government to its proof. For the same reason, I would tender the witness Jones. His testimony is not false, although, given my knowledge of the facts, I am aware that there was no consent and Jones' testimony creates the impression that there was consent. Again, this is proper because the government bears the burden of proof as to each element of the crime, including lack of consent, and, although I have a clear duty not to present any false testimony, I may properly present truthful testimony which tends to undermine the prosecution's case. Presenting Jones' testimony is little different from discrediting a government witness, whose testimony I may know to be true, on the basis of prior conviction for crime.

However, I would advise the defendant that I cannot permit him to testify falsely because of my ethical obligations and because he would be committing perjury. Occasionally, defendants nevertheless insist on testifying. In these cases my practice is to seek leave to withdraw from the case immediately. The court is generally reluctant to grant leave to withdraw, although my failure to present reasons for my request presumably makes it clear that I have ethical difficulties. If my request is denied, I will renew it immediately prior to trial before the trial judge. If again denied, and being unable to dissuade the defendant from testifying—and clearly he cannot be prevented from testifying—I would be inclined to present his testimony in the same fashion I would any other witness. In these circumstances counsel has attempted twice to fulfill his obligation to the court, and the court, cognizant of the reason for the request, has twice declined to relieve counsel of his obligation to his client. I do not believe it is proper for defense counsel to present the defendant's testimony in a fashion that may lead the jury to conclude that counsel does not believe his client. I repeat, however, that it would be clearly improper for counsel to present any other witness whose testimony he knows is not the truth.

Question three presents the situation in which the defendant maintains his innocence but wishes to plead guilty to a lesser charge. In our

hypothetical situation, the prosecutor will reduce a capital offense to one carrying a maximum sentence of six months for a guilty plea. It seems to me that the defendant should be entitled to enter the plea. The recent opinion in *McCoy v. United States*,[3] said that the court has discretion to accept a guilty plea notwithstanding the fact that the accused does not concede his guilt. Therefore, counsel in our hypothetical should advise the defendant that the latter may attempt to enter a plea of guilty to assault and battery, and that the plea may be accepted if counsel points out to the court that the evidence against the defendant is sufficient to justify a jury verdict of guilty. However, counsel should also advise his client that the plea may not be accepted without an acknowledgment of guilt, whereupon the latter may suggest that he can tell the court he is guilty even though this is not true.

This is a very difficult problem. I believe that the law in this area is wrong, that a defendant should have an absolute right to enter a plea to a lesser charge with the advice of competent trial counsel. As an illustration, I recall a case where a woman of about forty-five years was charged with second-degree murder. The offense is punishable by life imprisonment. The prosecution's case rested mainly on a confession, the admissibility of which was in doubt. On the morning of trial the prosecutor suggested that she might plead guilty to simple assault, which is punishable by a term of not more than one year. I had previously advised the defendant not to plead guilty to manslaughter or to assault with a dangerous weapon on the occasions when these dispositions were offered to her, because I believed I could exclude her confession and also felt that she had acted in self-defense. She did, however, have a previous conviction for assault with a dangerous weapon. I advised her that I believed I could obtain an acquittal, but that I would permit her to enter a plea to simple assault. She decided to do so, and stated to the court that she was guilty of simple assault. Her sentence was six months.

3. 363 F.2d 306 (D.C. Cir. 1966).